Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1994

SALARIED EMPLOYEES ASSOCIATION OF THE BALTIMORE DIVISION, FEDERATION OF INDEPENDENT SALARIED UNIONS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

WESTINGHOUSE ELECTRIC CORPORATION,
Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board erred in finding that the employer did not violate Sections 8(c)(5) and (l) as defined in Section 8(d) of the National Labor Relations Act, when the employer failed to follow the seniority provisions of its Collective Bargaining Agreement during layoffs that occurred in 1991 and 1992 thereby denying the employees rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

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JURISDICTIONAL STATEMENT

i. Subject matter jurisdiction for the National Labor Relations Board is found at 29 U.S.C.A. Sec. 160(c). The Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce. Westinghouse Electric Corporation (hereinafter the intervenor/employer) is a Pennsylvania corporation with an office and manufacturing facility in Baltimore, Maryland. In the course and conduct of its business, Westinghouse annually purchases and receives directly from points outside of Maryland goods and products valued in excess of $50,000. Westinghouse is an employer engaged in interstate commerce within the meanings of Sections 2(2), 2(6) and 2(7) of the National Labor Relations Act. The Salaried Employees Association of the Baltimore Division, Federation of Independent Salaried Unions is a labor union within the meaning of Section 2(5) of the Act. Said Union filed an unfair labor charge against Westinghouse within Section 8(C)(5) of the Act.

ii. Appellate jurisdiction for the United States Court of Appeals is found at 29 U.S.C.A. Sec. 160(F). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair laborpractice in question was alleged to have been engaged in . . .The Petitioner sought review of a final order and decision of the National Labor Relations Board issued on November 24, 1993. The alleged violation took place at the Westinghouse facility located in Baltimore, Maryland. Since the facility was located within the Fourth Circuit, the Petitioner filed a

timely Petition for Review in the United States Court of Appeals for the Fourth Circuit on December 20, 1993.

iii. The judgment of the Court of Appeals was entered on January 19, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

NATIONAL LABOR RELATIONS ACT 29 U.S.C. Sec. 151-168 (1947).

29 U.S.C. 152 Definitions

When used in this subchapter-

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States of any wholly owned Government corporation ...

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The terms "commerce" means trade, traffic, commerce, transportation, or communication among several States, or between the District of Columbia or any Territory of the United States ...

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

29 U.S.C. 158 Unfair labor practices

(a) It shall be an unfair labor practice for an employer -

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title

29 U.S.C. 160 ... Finding and Orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such

unfair labor practice, and to take affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter ...

29 U.S.C. Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of Board be motified or set aside ....

28 U.S.C. 1254 Court of Appeals; certiorari, appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before ofr after rendition of judgment or decree; ...

STATEMENT OF THE CASE

A. Procedural History

> On November 19, 1991, the Salaried Employees Association of the Baltimore Division, Federation of Independent Salaried Unions (hereinafter "Union") filed an original charge with the NLRB in Case No. 5-CA-22392 against Westinghouse Electric Corporation (hereinafter "Company") alleging that since on or about November 14, 1991, the Company had violated Section 8(c)(l) and (5) of the National Labor Relations Act by unilaterally changing the seniority provisions of the Collective Bargaining Agreement. On December 12, 1991 the Union filed an amended charge against the Company alleging that the Company had violated Section 8(c)(l) and (5) and (d) of the Act by unilaterally changing the seniority provisions of the Collective Bargaining Agreement between the Union and the Respondent and by laying off employees by improperly transferring their work (The NLRB ruled in the Company's favor on the transfer of work issue and is not at issue in this Petition for Review.)

On April 30, 1992, a Complaint and Notice of Hearing was issued alleging that the Company violated Section 8(c)(l) and (5) of the Act, on or about December 30, 1991, by failing to continue in effect all the terms and conditions of the Collective Bargaining Agreement and by modifying the Agreement by dispositioning employees based in part upon whether they held "special access clearances" rather than by

seniority as the contract states. The Complaint alleged that the Company took this action without prior notice to the Union; without affording the Union an opportunity to bargain with the Company; and without obtaining the Union's consent. The Company denied these allegations in its answer of August 24, 1992.

Subsequently, on November 2, 1992 the Union filed another charge in Case No. 5-CA-23106 alleging the Company had again violated Section 8(c)(1)(5) and (d) of the Act by dispositioning employees based upon whether they had a "special access clearance" rather than by seniority. The Company again denied the allegations.

On November 25, 1992, an order consolidating cases was issued and a hearing took place on November 30 and December 2, 3, and 4, 1992 before Administrative Law Judge James L. Rose.

On March 12, 1993, the administrative law judge issued his decision and order recommending that the complaints be dismissed. Both the Union and the Company filed exceptions to the order with the NLRB. The NLRB issued a Decision and Order on November 24, 1993 upholding the administrative law judge's recommendation to dismiss the contract breach and overturning his ruling on the transfer of work.

On September 6, 1994, the Union filed a Petition for Review of the National Labor Relations Board Order and on January 19, 1995 the Petition was denied by unpublished per curiam opinion.

B. Statement of Facts

In reviewing the NLRB Decision and Order relative to this matter, it is important to understand the two major areas of contention of the parties; those being the disposition procedures of the contract and how special access clearances impact those proceedings.

1. Since at least the 1950s, the Union and the Company have negotiated a series of Collective Bargaining Agreements which set forth the procedures that are to be followed if there is a layoff at the Baltimore facility.

The overriding principle of the "Disposition Procedures" is that more senior employees are permitted to replace or bump less senior employees within the same "occupation", "occupational group", "occupational ladder", "career ladder", "seniority unit", or "progression". The Company admits that during layoffs that occurred in December 1991 and December 1992, the Company dispositioned more senior employees because less senior employees had a type of security clearance referred to as special access clearance (hereinafter "SAC"). There is also no dispute that the Collective Bargaining Agreement contained no language granting less senior employees "superseniority" because of this SAC.

2. Special Clearances

Much of the work performed by the employees represented by the Union involves the development and production of high technology military products for the U.S. Government. As a result, many employees must obtain security clearances. The levels of security clearances at the Baltimore facility, from lowest to highest, are confidential, secret and top secret. As the Manager of Plant Line

Operations testified, an employee cannot work on a top secret program unless he has a top secret clearance. However, no employee has been denied a bump due to the lack of such a clearance.

In addition to the previous stated "government" clearances, an employee may be required to obtain a SAC to work on certain projects. Unlike other clearances, SACs are contract specific. The process of obtaining a SAC can take from as little as four weeks to as long as two years to complete, although no such clearance has taken two years. While the employee is waiting for his clearance, he may work in a non-classified area, on non-classified work within the program.

The Company has worked on contracts requiring SACs since the 1970s. However, the process for selecting employees for such a clearance is haphazard at best. When a need arises for employees to work on "Dark World" or "security sensitive" jobs, managers "nominate" employees who possess the requisite skills. These nominations usually involve employees working on projects that are about to cease or relatively new employees who have not been assigned to any long-term program. Therefore, employees who have been working for relatively long periods of time (more senior employees) on ongoing projects are less likely to have an opportunity to be considered for a SAC. The net result is that more senior employees are more likely to be dispositioned than employees with less seniority who were inappropriately selected for special access programs. This arbitrary method by which the Company qualifies employees for special access clearances has created the situation that led to this litigation. The Company on three separate occasions, 1985, December 1991 and December 1992 has dispositioned more senior employees for their lack of SAC in clear violation of the Collective Bargaining Agreement.

ARGUMENT/REASONS FOR GRANTING THE PETITION

The Fourth Circuit Court of Appeals' decision to deny the Petitioner's Petition for Review was error in that Petitioner demonstrated that its members were denied due process under the Company's security clearance procedures.

There is no argument that Section IX-7 of the current national agreement and Section 4 of the relevant local supplement require the Company to retain the most senior employees during a layoff. There can also be no dispute that the relevant contractual language contains no explicit exception that grants junior employees job retention due to their SACs. The Company has been unable or unwilling to negotiate a change in the disposition procedure since the issue arose in 1985. Instead, it has violated the plain language of the contract with the knowledge that it would not have to answer to an arbitrator and with the hope that a court or the NLRB would excuse its behavior.

As noted by the judge in Westinghouse Electric Corporation, 278 NLRB 424, 432 (1986) enf. denied on other grounds, 809 F.2d 419, 124 LRRM 2414 (7th Cir. 1987):

[The] refusal of an employer to negotiate with the representative of its employees concerning mid-term revisions of wages, hours or terms and conditions of employment is a violation of Section 8(c)(5) of the Act, and it is no defense that such a refusal to bargain did not take place in the context of overall subjective bad faith. NLRB v. Benne, 369 US 736 (1962) Moreover, the fact that the respondent's action in making unilateral charges is prompted by economic rather than discriminatory considerations is immaterial if it did not bargain about those changes. Presumably, most positions taken with

respect to changes on contract terms are economically motivated.

In the present case, the Company's economic motivation for violating the contract is that the violations are the cheapest and easiest method of satisfying its customers needs for employees with SACs. The Act simply does not allow unilateral changes in the Collective Bargaining Agreement because such changes are in the best interest of its business.

In addition to Section 8(c)(5) protection, "Section 8(d) protects every party to a Collective Bargaining Agreement (hereinafter "CBA") from involuntarily incurring any additional bargaining obligations for the duration of the argument". Connecticut Light and Power Co., 271 NLRB 766, 767 (1984) "It is settled law that any employer's midterm contract modification made without the consent of the employees' collective bargaining representative is a violation of Section 8(c)(5) of the Act is elucidated in Section 8(d)" Speedrack, Inc., 293 NLRB 1054 (1984) An employer's failure to abide by its CBA is not a mere breach of contract, but rather constitutes a violation of Section 8(c)(5) of the Act. Therefore, because the Union did not consent to the Company's unilateral change of the disposition procedures of the contract, that change was in violation of Section 8(c)(5).

The Company advanced the argument that the CBA permitted it to disregard the seniority provisions in that SACs were a qualification to do the job. The administrative law judge erroneously accepted this premise as an exception to the plain language of the contract.

The word "qualification" as used by the Union and the Company is a term of art and the record establishes that a SAC is not a "qualification". The parties use of the word

"qualification", while complicated, meaning has been clarified through decades of practice. The CBA does not state that an employee must be "qualified" in order to bump down into a position within his own progression, and the Company has never denied an employee a "bump down" within his own progression on the basis of "qualifications". However, when the Company increases staff, the practice has been to award the position to the most senior qualified employee. Furthermore, if a qualification is added to a lower job description, the Union and Company agree to "grandfather" all of the higher-rated employees so that they can bump into the lower positions regardless of their skills, education or experience. Therefore, if there is a decrease in the staffing of the same progression, every employee is deemed qualified for every lower position within that progression. Accordingly, under the established practice, the Company never denied an employee a bump into a lower position on the grounds that the employee was not qualified prior to the 1991 layoff. It should be noted that the Company's position regarding SAC is inconsistent with its position regarding top secret clearances. The Company concedes that top secret clearances and SACs are the same in one very important respect: an employee cannot work on a top secret program unless he has top secret clearance, and an employee cannot work on a special access program unless he has a SAC. Nonetheless, no employee has been dispositioned out of seniority because he lacked a top secret clearance. Neither of these types of clearance is mentioned in the seniority provisions of the contract. Yet, inexplicably, the Company appears to contend that a SAC is a "qualification", and that a top secret clearance is not. Such a result is neither logical nor supported by the language of the contract. Therefore, the appropriate finding is that a SAC is not a "qualification".

The Company's contention that SACs are "qualifications" also is undermined by the parties' practices regarding written job descriptions. First, the Company

invariably has included all qualifications on the written job description of every job within the units represented by the Union. The Company was not able to show even one exception to this practice. Therefore, because SACs are not included on the job descriptions involved in this case, such clearances cannot be considered to be "qualifications" for purposes of dispositions, within the meaning of the contract.

Second, the Collection Bargaining Agreement explicitly grants bargaining rights to the Union with respect to the creation of, and changes to, all job descriptions. Among those rights are the right to be notified of any new or changed descriptions 15 days in advance of their effective dates. Furthermore, the Union has the right to grieve any new or changed job description if no agreement is reached by the parties. Therefore, the Company was not free to add SACs as "qualifications" without notifying and bargaining with the Union, and without explicitly printing such "qualifications" on the written job descriptions after reaching such an agreement with the Union.

Third, pursuant to the contract section regarding job descriptions, the Company has been able to include special access security clearances as a qualification for certain jobs with the Union's agreement. Specifically, pursuant to a written agreement between the Union and the Company, since 1984 the job descriptions for employees within the Security Department have included language that requires those employees to obtain SACs. That language appears in the same portion of the job description form that contains all other types of qualifications for all of the other jobs represented by the Union, such as typing, education, and specialized work experience. The fact that SACs <u>are</u> included as qualifications on the Security Department job descriptions establishes that SACs are <u>not</u> qualifications, within the meaning of the contract, for job descriptions that do not include that language.

Accordingly, because the Company and the Union have not agreed to include SACs as qualifications on the written job descriptions involved in this case, such clearances are not "qualifications" for purposes of dispositions, within the meaning of the contract.

Furthermore, the Company did not even attempt to rebut Union President Eder's testimony that the Company never made its "qualifications" argument prior to the 1991 layoff announcement. In this regard, numerous documents written by the Company's managers since 1985, such as grievance answers, failed to use the word "qualification" when referring to the special access problem. In addition, the Company's announcement that SACs are "qualifications" came in the form a fait accompli, without the contractually required 15 days' notice. Accordingly, in view of the Union's previously demonstrated willingness to litigate the matter rather than permit a unilateral change, it appears that the Company created its "qualification" defense in anticipation of the instant litigation. The judge erred in ignoring this fact when he concluded that a SAC is a "qualification".

Furthermore, an internal memorandum from the Company's Manager of Corporate Special Security, Matt Whelan, to its Vice President and Director of Human Resources, Marvin E. Jones, dated November 25, 1985, acknowledges that the Company "must meet its contractual obligations to the employee's union," and urges Jones to reach an agreement with the Union regarding dispositions. During the seven years that have passed since Whelan's memorandum, the Company has signed two more collective bargaining agreements containing the same "contractual obligations", and it has chosen to disregard those obligations rather than negotiate an agreement to change them.

If the court reaches the same conclusion as the administrative law judge that the Company is permitted to disregard the language of the CBA and by Section 8(d) of the Act, the Union did not clearly and unmistakably waive its statutory right to bargain with the Company regarding the layoff of senior employees. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Johnson-Bateman Co., 295 NLRB 180, 184 (1989) Each violation of the employees' statutory and contractual rights has been met with a strong legal challenge from the Union.

When the Company violated the contract by dispositioning senior employees who lacked SACs in 1985-86, the Union filed grievances, appealed them to the national level at the Company's Pittsburgh offices, and requested arbitration after the appeals were turned down. The Union then sued the Company in Federal Court to enforce the contract and lost its appeal to the Circuit Court on procedural grounds. As noted above in the Facts section of this brief, the U.S. Supreme Court, in another case, subsequently rejected the rationale of the Third Circuit unanimously and emphatically. Groves, 135 LRRM at 3124

During the next reduction in force in February 1991, Westinghouse Managers Jackson and Berger each assured Union President Eder that they would do everything they could to avoid any "violations" of the dispositioning procedure and, in fact, no employees were dispositioned out of seniority. The Company did not violate the contract in the same way until the December 1991 reduction-in-force. When the Company announced to Union President Eder, in a telephone call from Manager Jackson, that the Company was interpreting SACs to be a "job qualification", Eder replied, "Bullshit", and proceeded to tell Jackson that SACs were not in any job description; that such clearances were not in the national agreement; that they were not in any local supplement; and that this was the first

time during the parties' long-term discussion of the issue that the Company had presented that defense. Shortly thereafter, on November 19, 1991, Eder filed a grievance regarding the matter. The next written communication from the Company on the matter was Manager Berger's December 3, 1991, letter identifying the junior employees who would not be dispositioned because they held SACs. The latter states that the named junior employees "hold special security clearance qualifications and . . . are being by-passed . . ." Id. Berger updated that announcement with a December 16, 1991 letter to Eder further identifying the junior employees "who are being by-passed". Both of these letters repeatedly use the word "qualification" in a transparent effort to establish a defense to the grievance and unfair labor practice charge that had been filed previously. Similarly, when the Company announced the specifics of its December 31, 1992 contractual violations, it did so with a letter identifying the junior employees "who will be by-passed".

In response to that improper application of the disposition provisions of the contract, the Union again filed grievances, appealed them, requested arbitration, and filed unfair labor practice charges; the Company again denied the request for arbitration.

Shortly before the hearing in the instant case, the Company announced that it would ignore the contract in the same way when the December 31, 1992, layoff occurred. After the close of the hearing, when the identities of the latest victims of the Company's contract interpretation became known, the Union filed another grievance.

Clearly, the Union has used the grievance procedure to the fullest extent possible, and has attempted to protect the employees by requesting arbitration and by litigating a related

lawsuit to the appellate level. Accordingly, the Union has not waived its rights by inaction.

Similarly, the Union did not waive its rights by failing to request bargaining. As noted above, the Company was not free to alter the terms of the CBA without the Union's consent, and the Company does not even contend that it obtained such consent. See Speedrack, supra; Connecticut Light and Power, supra. Accordingly, the Union was under no obligation to request bargaining, and any alleged failure to request bargaining is irrelevant.

Moreover, even if the Company's actions are found not to be a violation of its responsibilities under Section 8(d), the Union was relieved of any duty to request bargaining because the Company's unilateral changes were announced as a fait accompli in 1991 and 1992. See Alpha Biochemical corp., 293 NLRB 753, fn. 1 (1989) Thus, the parties had discussed the problem on many occasions since 1985 and were aware of each other's positions. When Berger announced that junior employees "are being by-passed" and used the word "qualification" in a continuation of Jackson's recently fabricated defense, the Union had no reason to construe the letter as an opportunity to bargain. Instead, it took the reasonable and prudent actions of filing a grievance and an unfair labor practice charge.

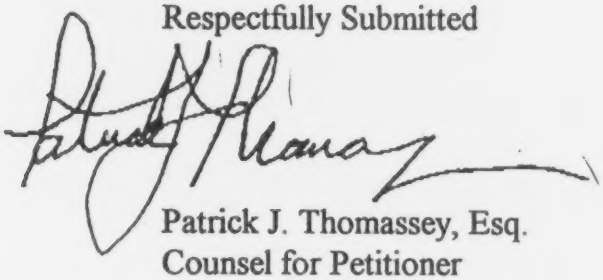
Furthermore, even if the Company's announcements of its contract violations could be interpreted as events that required the Union to request bargaining, the Union's responses to those announcements show that it did not clearly and unmistakably waive its statutory right to bargain. See Metropolitan Edison As the Board recognized in Century Wine and Spirits, 304 NLRB No. 69, slip op, at 28-29 (Aug. 26, 1991), "What constitutes sufficient notice and what constitutes a sufficient request to bargain depends on all the

circumstances of the case". In the instant case, given the history of the parties' dealings regarding the security by-pass issue, the Union's filing of the November 1991 grievance should be found to be an adequate request to bargain. Cf. W-I Forest Products Co., 304 NLRB No. 83, slip op. at 14-15 (Aug. 30, 1991)

CONCLUSION

The Court of Appeals for the Fourth Circuit erred in not granting Petitioner's Petition for Review and not setting aside the National Labor Relations Board's Order and find that Westinghouse Electric Corporation violated Section 8(c)(1) and (5) of the Act by improperly dispositioning more senior employees in violation of the Collective Bargaining Agreement and that the appropriate remedy be ordered.

Respectfully Submitted



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Counsel for Petitioner

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Decision and Order in *Westinghouse Electric Corporation and Salaried Employees Association of the Baltimore Division, Federation of Westinghouse independent Salaried Unions* by the National Labor Relations Board (Case Nos. 5-CA-22392 and 5-CA-23106)(Nov.24,1993)..... App. 9

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Salaried Employees Association of
The Baltimore Division, Federation
of Independent Salaried Unions,

Petitioner,

v. No. 93-2584

National Labor Relations Board,

Respondent,

Westinghouse Electric Corporation,

Intervenor.

On Petition for Review of an Order
of the National Labor Relations Board.

Submitted: September 6, 1994

Decided: January 19, 1995

Before WIDENER, WILKINS and NIEMEYER,
Circuit Judges.

Petition denied by unpublished per curiam opinion

COUNSEL

Patrick J. Thomassey, Monroeville, Pennsylvania, for Petitioner. Frederick L. Feinstein, General Counsel, Linda Sher, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Frederick C. Harvard, Supervisory Attorney, Marilyn O'Rourke, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. Michael A. Taylor, Jonathan R. Mook, Celeste M. Wasielewski, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Washington, D.C.; Barnett Q. Brooks, WESTINGHOUSE ELECTRIC CORPORATION, Baltimore, Maryland, for Intervenor.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Salaried Employees Association of the Baltimore Division, Federation of Westinghouse Independent Salaried Unions ("the Union") filed this petition for review of an order of the National Labor Relations Board ("the Board"). Because we find that substantial evidence supports the Board's decision, we deny the petition for review and grant enforcement of the Board's order.[1]

Westinghouse Electric Corporation ("the Company") has a facility in Baltimore, Maryland, where it manufactures

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[1] This Court granted Petitioner's unopposed motion to submit the case on all briefs without the aid of oral argument.

defense and radar systems, primarily for the United States government. The Union has represented employees at that facility since at least 1950, when the first collective bargaining agreement between the parties became effective.

This dispute arose over the Company's 1991 decision to lay off certain employees and the procedures followed by the Company in doing so. Although the employees who were laid off possessed more seniority than certain retained employees, the Company refused to allow them to "bump" into lower level positions that required a special security clearance which the senior employees did not possess. The Union contends that in refusing to allow the more senior employees to bump the junior employees, the Company committed an unfair labor practice in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § (a)(5) (1988).

After the Company's denial of the Union's grievances and request to arbitrate the matter, the Union filed this action in federal district court. Following a hearing on the complaint, the administrative law judge ("ALJ") found that the Company did not violate Sections 8(a)(5) and (1) of the Act: (1) by failing to permit senior employees to exercise contractual bumping rights against junior employees in jobs requiring special access clearance; and (2) by failing to bargain about a decision to lay off unit employees and to transfer their work. The Union appealed to the Board. The Board affirmed the ALJ's decision on the first issue. *Westinghouse Elec. Corp.*, 313 N.L.R.B. No. 60 (1993). On the second issue, the Board found that the Company had engaged in unfair labor practices. The Union then petitioned this court for review.[2]

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[2] The Company has not appealed the Board's adverse finding on the transfer-of-work issue. Thus, that finding is not presently before us for review.

A brief description of the Company's operations is helpful. Many jobs in the Company's bargaining units require some kind of security clearance. The contracting government agency for a given project decides which types of clearance are necessary and conducts the investigation of those employees nominated for clearance. The most highly classified clearance category is a Special Access Clearance ("SAC"). Unlike other types of clearance, employees are not given SAC in advance of their need for it. Clearance may take more than a year to complete. However, there is ordinarily sufficient lead time between the time a contract is awarded and commencement of work on the project to allow the clearance process to be completed. Finally, SAC classification is job-specific, so that an employee who holds SAC status for a particular job cannot transfer to another job requiring SAC without a new investigation and clearance.

The local supplement to the national collective bargaining agreement establishes the procedure for a layoff of unit employees. Essentially, the agreement provides that an employee whose job is scheduled for elimination may bump a less senior employee within the same job progression or in a different job progression (if the laid off employee has previously held that position). Finally, if the laid off employee has the necessary "occupational experience, education, and suitability" for the job, the employee may bump into the common seniority unit.

In December 1991, the Company laid off approximately 1200 employees, of which 150 were represented by the Union. In October 1992, the Company announced additional layoffs to be effective December 1992. During these layoffs, the Company refused to allow senior employees who did not possess SAC classification to bump junior employees who did not possess the required SAC

classification, arguing that the SAC classification was a job qualification.

Beginning with a 1985 layoff, the Union and Company have disagreed about how the bumping procedure should work when SAC classifications are involved. The Union asserts that seniority is absolute; the Company maintains that where having SAC is required for a particular job, an employee without such clearance cannot bump into that job. Although the Union has tried numerous times to make seniority by-pass the subject of arbitration under the contract, the Company has not agreed to such a provision. New collective bargaining agreements were negotiated in 1988 and 1991 without the parties having changed their respective positions on the issue.

Thus, this appeal presents the issue whether the Company's implementation of its layoff procedure amounts to a unilateral mid-term modification of the contract in violation of Section 8(a)(5). Determining whether an employee has made such unlawful unilateral changes often requires the Board to interpret the terms of a contract between an employer and union. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 429 (1967). The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e) (1988); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Nueva Eng'g, Inc.* 761 F.2d 961, 965 (4th Cir. 1985).

The Board agreed with the ALJ that the Company acted pursuant to its longstanding interpretation of the contractual provisions in excepting employees with SAC clearance from seniority-based bumping procedures. However, the Board also found that the Union's position (seniority controls absolutely) was based on a contrary plausible interpretation of those provisions.

Where the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, the Board properly declined to determine which of two equally plausible contract interpretations is correct. *Atwood & Morrill Co.*, 289 N.L.R.B. 794, 795 (1988); *NCR Corp.*, 271 N.L.R.B 1212, 1213 (1984). In such cases, the appropriate action for the Board is to dismiss a complaint allegation of unlawful unilateral change. *Atwood*, 289 N.L.R.B. at 795.

Here the fact that the Union and Company have disagreed about the SAC bumping procedure for almost a decade, and have been unable to resolve the issue during contract negotiations, supports the Board's finding that this issue rests entirely upon two plausible interpretations of the parties' contract. Thus, we find that substantial evidence supports the Board's order. Accordingly, we deny the petition for review and grant enforcement of the order.

PETITION DENIED

Westinghouse Electric Corporation *and* Salaried Employees Association of the Baltimore Division, Federation of Westinghouse Independent Salaried Unions. Cases 5-CA-22392 and 5-CA-23106

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues in this case are whether the judge correctly found that the Respondent did not violate Section 8(a)(5) and (1) of the Act: (1) by failing to permit senior employees who were "dispositioned" by layoffs to exercise contractual bumping rights against junior employees in jobs requiring "special access clearance"; and (2) by failing to bargain about a decision to lay off unit employees and to transfer their work[1].

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,[2] and

[1] On March 12, 1993, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Union filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief supporting cross-exceptions and answering the General Counsel's exceptions. The General Counsel filed a reply brief. The Baltimore Salaried Employees Association and the Federation of Westinghouse Independent Unions submitted an amicus brief and exceptions

[2] The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance

conclusions only to the extent consistent with this Decision and Order.

1. We agree with the judge, for the reasons fully described in his decision, that the Respondent acted pursuant to its longstanding and plausible interpretation of relevant contractual provisions in excepting employees with "special access clearance" from seniority-based bumping procedures during layoffs in December 1991 and 1992. The General Counsel's theory of violation depends on a contrary plausible interpretation of those provisions. The Board has repeatedly held that "[w]here... the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988). In accord with this precedent, we adopt the judge's recommendation to dismiss the complaint's allegation of an 8(a)(5) contract breach.[3]

2. We reach a different conclusion with respect to the judge's dismissal of the complaints allegation that the Respondent violated Section 8(a)(5) by its unilateral decision to lay off four employees and to transfer their work. We find that the Respondent unlawfully failed to bargain about a mandatory subject of bargaining.

The Union has been the representative of several bargaining units of the Respondent's employees at its Baltimore, Maryland facility. The Command and Control

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of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings

[3] We do not rely on the judge's comments about the relative suitability of Board litigation and private arbitration for resolution of the issue presented

Division unit included employees working in the West Building Calibration Laboratory. The Baltimore Aerospace Division unit included employees working in the East Building Calibration Laboratory.

On October 30, 1991, the Respondent gave the Union a list of employees whose positions would be eliminated in a December layoff. According to the uncontradicted testimony of Union President Gary Eber, he telephoned Charles Berger, the respondent's manager of human relations programs and salaried employees relations, to ask about the inclusion on the layoff list of four unit employees working in the West Building lab. Berger disclosed the Respondent's intent to close that laboratory and to transfer work performed there to current employees working in the more modern and efficient East Building lab. Eber argued that the collective-bargaining agreement required a "decrease in work load" before any layoff could occur. Berger's response was "that it's management's right, they have the right to do it, and so they're doing it".

Eber subsequently discussed the matter with Michael Jackson, the respondent's manager of personnel and union relations. Jackson ultimately told Eber that "[i]t's a management decision and that's it." In December 1991, the respondent implemented its previously announced lab closing, layoff, and work transfer plan. In early 1992, the Respondent denied the Union's grievance of this action and declined to proceed to arbitration.

The Respondent defends its unilateral action by contending that it had no obligation to bargain or, alternatively, that the Union waived its right to bargain by failing to request bargaining after timely advance notification of the intended action. The judge addressed only the former defense. Based on the test set forth in *Dubuque Packing*, 303 NLRB 386 (1991), he found that the General Counsel had presented a prima facie case that the work transfer and layoff decision was a mandatory subject of bargaining because it did

not involve a basic change in the nature of the Respondent's operation. He further found, however, that the Respondent met its burden of proving that it had no duty to bargain because labor costs were not a factor in its decision. In this regard, the judge relied on the identity of wage scales for employees in both labs and the fact that the East Building lab was more modern and efficient than the West Building lab. The judge acknowledged that the layoff of employees for whom there was no longer work entailed labor cost savings, but he reasoned that "this is not the kind of labor costs the Board contemplated in *Dubuque*".

Contrary to the judge, we find that the Respondent had a statutory obligation to bargain about the decision in dispute. We view the analysis of an employer's unlawful unilateral decision to consolidate jobs and to lay off employees in *Holmes & Narver*, 309 NLRB 148 (1992), as dispositive here. In both *Holmes & Narver* and the present case , the employer has essentially decided to continue doing the same work with fewer employees. There was no change in the scope and direction of the corporate enterprise; and a shift of work from a group of employees in one building on an employer's corporate premises to a group of employees in another employer-owned building at the same site is not the kind of relocation which we dealt with in *Dubuque*. The present case involves essentially one plant, albeit operations were located in several different buildings, and the reassignment of work from one group of calibration employees to another was akin to "assignment of work among potentially eligible groups within the plant." which is among those matters "recognized as subjects of compulsory bargaining. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 224 (1964)(Stewart, J. concurring; footnote omitted).[4] Accordingly, as the Board held in *Holmes*

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[4] It bears reiterating that the statutory obligation to bargain never requires that an employer agree to whatever the bargaining representative seeks or that it forego efforts to

& Narver, it is unnecessary to engage in the *Dubuque* multistep analysis to justify the conclusion that a decision in this category is a mandatory subject of bargaining.[5] The Respondent could not implement such a decision prior to giving the Union adequate notice and opportunity to bargain about it.[6]

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achieve greater efficiencies. Doubtless it is desirable, from an employer's point of view, to speed up production and perform the same work with fewer employees. Clearly, the Respondent could save money by having all the calibration laboratory work performed by fewer employees working in a single laboratory. The Act simply requires that such fundamentally employee-focused decisions be negotiated with the bargaining representative.

[5] We nevertheless specifically disavow the judge's mistaken statement that financial savings gained from the layoffs here are not the kind of labor cost contemplated in *Dubuque*. We also disavow any implication that an evaluation of labor costs as a factor in a managerial decision to transfer work is limited to a comparison of the wages of the employees involved.

[6] For the reasons set forth in Member Raudabaugh's concurring opinion in *Holmes & Narver*, he would apply the *Dubuque* test to analyze the respondent's obligation to bargain about the entrepreneurial decision at issue here. Indeed this case is even more clearly subject to the *Dubuque* test than was *Holmes & Narver. Holmes & Narver* involved an employer's decision to do the same work with fewer employees. The instant case involves the closing of a laboratory and the transfer of the work elsewhere. In sum, the decision in this case, even more clearly than the one in *Holmes & Narver*, is within category 3 of *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). Accordingly, Member Rauabaugh finds that the instant case is particularly appropriate for the application of *Dubuque*, , a test for

We find no merit in the Respondent's alternative contention that the Union waived its right to bargain by failing to request bargaining in the nearly 2-month period between disclosure of the Respondent's plans and the implementation of those plans. According to Union President Eber's uncontradicted testimony, the Respondent's labor officials clearly indicated their view that the decisions involved here were matters solely within management's discretion and not subject to collective bargaining. In these circumstances, it

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category 3 cases. Applying the *Dubuque* test, Member Raudabaugh agrees with the judge that the General Counsel has established a prima facie case that the decision was a mandatory bargaining subject. Contrary to the judge, however, Member Raudabaugh finds that the Respondent failed to meet its affirmative burden of proving either that labor costs were not a factor in the decision or that the Union could not have offered cost concessions which could have altered the decision. In this regard, Member Raudabaugh agrees with his colleagues that the financial savings effected by laying off employees constitutes a savings of labor costs within the meaning of the *Dubuque* test. Further, the Respondent did not show that the Union could not have made concessions sufficient to change the decision.

Finally, Member Raudabaugh notes that the D.C. Circuit's formulation of the above-mentioned aspect of the *Dubuque* test. *Commercial Workers Local 150-A v. NLRB*, review denied mem. 989 F.2d 7 (1993). In *Dubuque*, the Board said that the employer is not required to bargain if the employer shows that the union *could not* make sufficient concession. The court added that the employer is not required to bargain if the employer could show that the union *would not* make those concessions, i.e., was unwilling to make them. Accepting arguendo the D.C. Circuit's formulation, Member Raudabaugh finds that the Respondent here has not made either of the showings contemplated by the D.C. Circuit.

would have been futile for the Union to make a formal request for bargaining about a decision which was effectively presented as a fait accompli. We therefore find that the Respondent violated Section 8(a)(5) by failing to bargain with the Union about the decision to transfer work from the West Building lab to the East Building lab and to lay off four employees who had been performing the work in the West Building lab.

CONCLUSIONS OF LAW

1. The Respondent, Westinghouse Electric Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Salaried Employees Association of the Baltimore Division, Federation of Westinghouse Independent Salaried Unions (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to bargain with the Union about a decision to transfer Command and Control division bargaining unit work and to lay off four employees in that unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section8(a)(5) and (1) of the Act by failing to bargain with the Union about a decision to transfer bargaining unit work and to lay off unit employees, we shall order it to cease and desist from engaging in such conduct and to bargain on request with the Union about this decision. We shall further order the Respondent to offer the four employees who were laid off pursuant to its unlawful unilateral action immediate and full reinstatement to their former jobs, or, if those jobs no longer

exist, to substantially equivalent positions. If necessary to fulfill its reinstatement obligation, the Respondent shall reopen the West Building Calibration Laboratory. The Respondent shall also make whole these employees for any loss of earnings and other benefits suffered as a result of its unlawful unilateral action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The Respondent, Westinghouse Electric Corporation, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, as the exclusive collective-bargaining representative of a unit of the Respondent's employees in the Command and Control Division, about a decision to transfer work from the west Building Calibration Laboratory to the East Building Laboratory and to lay off unit employees who had been performing this work in the West Building.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union in good faith about the decision to transfer work from and to lay off bargaining unit employees working in the West Building lab.

(b) Offer the four employees who were laid off as part of the unilateral decision to transfer work from the West Building lab immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, reopening, if necessary, the West

Building lab, without prejudice to their seniority or any other rights of privileges previously enjoyed, and make them whole, with interest, for any loss of earnings or benefits suffered as a result of Employer's unlawful action in the manner set forth in the remedy section of this Decision and Order.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Baltimore, Maryland, copies of the attached notice marked "Appendix."[7] 7 Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the respondent has taken to comply.

Dated, Washington, D.C. November 24, 1993

/s/ James M. Stephens
James M. Stephens, Chairman

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

/s/ Dennis M. Devaney
Dennis M. Devaney, Member

/s/ John N. Raudabaugh
John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD